

Note

Representation Under the Ohio Public Defender Act

*If we are to keep our democracy,
there must be one commandment:
Thou shalt not ration justice.¹*

I. INTRODUCTION

The last forty-five years have witnessed such an expansion in the constitutional right to publicly provided legal counsel² that a corollary to the above-quoted commandment might be suggested: To avoid a rationing of justice, thou shalt develop an efficient system for providing legal counsel for those unable to retain their own. The Ohio Public Defender Act, enacted in 1975,³ could be viewed as at least a partial response to such a corollary commandment. The Act, which enacted chapter 120 of the Ohio Revised Code⁴ and amended or repealed numerous Revised Code sections, created the Ohio Public Defender Commission⁵ and authorized publicly provided representation services at both the state and local levels under the ultimate supervision of the Commission.⁶

Perhaps the most significant issues under the Act relate to its provisions for legal representation at the state or local level.⁷ The Act's general representation scheme is an appropriate response to state and local interests in maintaining and controlling a system of publicly provided representation. The Act, however, is plagued with problems of interpretation. In some cases, the Act authorizes representation well beyond that required by constitutional dictates. Other representation provisions, however, fall short of what the Constitution has been held to require. Furthermore, many of the particular representation provisions are seemingly devoid of comprehensible meaning. Such statutory confusion necessarily hinders the implementation of an effective

1. *Hardy v. United States*, 375 U.S. 277, 293-94 (1964) (Goldberg, J., concurring) (quoting Judge Learned Hand, address before Legal Aid Society of New York (Feb. 16, 1951)).

2. *See, e.g.*, *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

3. Am. Sub. H.B. No. 164, 136 Ohio Laws 1868 (1975).

4. OHIO REV. CODE ANN. §§ 120.01-.40 (Page 1978).

5. *Id.* § 120.01.

6. *Id.* §§ 120.06, .16, .26, .33.

7. Another significant issue is the effect of the Act on state reimbursement of county-paid counsel services and court costs. *See, e.g., id.* §§ 120.18, .28, .33(D); 2949.19-.20; 2301.24-.25; 2941.51 (Page 1978 & Supp. 1977).

program of representation and leaves public defenders, private attorneys, the judiciary, and potential clients in doubt concerning the proper role for the various public defender offices and for assigned private counsel.

This Note will first set forth the constitutional backdrop against which the Ohio Act was passed. It will then discuss the mandatory and permissive representation provisions for the state public defender and for local public defenders respectively and the relationship between public defender representation at each level. Representation under a county-level option for the use of an assigned private counsel system will also be described. Finally, the Act's provisions relating to indigency as an eligibility requirement for clients will be discussed. Within this framework, the Note will analyze the Act in terms of the types of cases in which representation is authorized, the stages of the proceedings at which representation is to begin and continue, and the types of clients eligible for legal services under the Act. This Note will evaluate the Act's general scheme for providing legal services, its constitutional sufficiency, and its statutory clarity or lack thereof.

II. CONSTITUTIONAL PRESSURES LEADING TO THE ENACTMENT: THE RIGHT TO PUBLICLY PROVIDED LEGAL COUNSEL

In order to properly analyze and evaluate the Ohio Public Defender Act's provisions for legal representation in Ohio, it is first necessary to delineate the nature and extent of the constitutional right to publicly provided counsel to which the Act responds.⁸

A. *In What Types of Cases Does the Right Exist?*

Upon reading the sixth amendment, one would conclude that a right to counsel exists in any and all "criminal prosecutions," and not in other types of proceedings.⁹ The right, however, has been interpreted to be both narrower and broader than the sixth amendment's literal command. Prior to *Gideon v. Wainwright*,¹⁰ the sixth amendment was not directly applicable to state criminal prosecutions at all,¹¹ and even today one may be denied counsel in certain state criminal prosecutions.¹² On the other hand, the United States Supreme Court has extended the right to counsel to quasi-criminal juvenile proceed-

8. See generally Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601 (1975); Note, *Of Trumpeters, Pipers, and Swingmen: What Tune is the Burger Court Playing in Right to Representation Cases?*, 29 VAND. L. REV. 776 (1976).

9. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Ohio Constitution also provides for assistance of counsel in criminal prosecutions. OHIO CONST. art. I, § 10.

10. 372 U.S. 335 (1963).

11. *Betts v. Brady*, 316 U.S. 455 (1942).

12. See *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

ings,¹³ and the Supreme Court of Ohio has specifically recognized a federal constitutional right to counsel in involuntary civil commitment proceedings.¹⁴

As to criminal prosecutions, the United States Supreme Court in *Powell v. Alabama*¹⁵ first recognized the right to counsel in a prosecution for a capital offense. The Court later extended the right to all federal criminal prosecutions¹⁶ and—twenty-five years later—to state felony prosecutions.¹⁷ Finally, in *Argersinger v. Hamlin*,¹⁸ the Court held that no person could be imprisoned for a criminal offense, even a misdemeanor, unless he had had the opportunity for assistance of counsel.

The precise contours of the *Argersinger* decision have been subject to debate. Most courts have held that there is no violation of one's right to counsel in misdemeanor cases unless imprisonment is actually ordered, regardless of the potential penalty.¹⁹ Other courts have indicated that the right to counsel not only precludes imprisonment in the absence of counsel, but also extends a positive right to counsel in the case of any "serious" offense for which a significant maximum imprisonment is authorized by statute, even if the judge specifically indicates before trial that he will not in fact impose an incarceration penalty.²⁰ One noted jurist has expressed the broadest view of *Argersinger*: that the case "extended the right to counsel to every offense that could possibly result in imprisonment, even for 1 day."²¹

The right to counsel has also been recognized in proceedings that have traditionally been viewed as civil.²² In *In re Gault*,²³ the United

13. *In re Gault*, 387 U.S. 1 (1967). In cases other than criminal prosecutions, the right is not founded on the sixth amendment, but instead is based on the due process clause of either the fifth or the fourteenth amendment. See *id.* at 41.

14. *In re Fisher*, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974).

15. 287 U.S. 45 (1932).

16. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

17. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Even before *Gideon*, the Supreme Court had recognized a right to counsel in certain noncapital state felony prosecutions, when exceptional circumstances were thought to demand the presence of defense counsel. See, e.g., *Chewning v. Cunningham*, 368 U.S. 443 (1962).

18. 407 U.S. 25 (1972).

19. E.g., *Sweeten v. Sneddon*, 463 F.2d 713 (10th Cir. 1972); *Mahler v. Birnbaum*, 95 Idaho 14, 501 P.2d 282 (1972). See also L. HERMAN, *THE RIGHT TO COUNSEL IN MISDEMEANOR COURT* 74 (1973).

20. E.g., *Wood v. Superintendent Caroline Correctional Unit*, 355 F. Supp. 338 (E.D. Va. 1973). See also *Mills v. Municipal Court*, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973). For a vehement argument that this represents the proper view, see Duke, *supra* note 8, at 604-09.

21. Clark, *Gideon Revisited*, 15 ARIZ. L. REV. 343, 352 (1973). It has been suggested that the Supreme Court might extend the right to counsel to cases having no potential for imprisonment at all, but having possible penalties including a loss of privilege or significant opprobrium. Note, *supra* note 8, at 792-93.

22. See generally Rossman, *The Scope of the Sixth Amendment: Who is a Criminal Defendant?*, 12 AM. CRIM. L. REV. 633 (1975).

23. 387 U.S. 1 (1967).

States Supreme Court guaranteed assistance of counsel to juveniles in juvenile court proceedings that could result in incarceration. Although the Court in *Gault* did not specifically extend the right to counsel to parents in juvenile proceedings that could remove their child from them, there are indications that this right may exist.²⁴ Furthermore, it has been suggested that the Supreme Court would²⁵ or should²⁶ extend the right to counsel to those threatened with civil commitments. The Supreme Court of Ohio, in *In re Fisher*,²⁷ has expressly recognized a federal right to counsel in mental commitment proceedings—civil proceedings to determine whether a person should be involuntarily committed to a mental institution. For proceedings to adjudicate alleged incompetency, but not to result in commitment, no constitutional right to counsel has been recognized, although many states provide a statutory right in these circumstances.²⁸

B. *At What Stages in the Proceedings?*

Especially in criminal cases, the recognition of a right to counsel at trial does not put to rest the issue of legal representation. Rather, it must also be determined when the right to counsel first attaches before trial and when the right exists after the trial stage has passed. In *United States v. Wade*,²⁹ the United States Supreme Court stated that an accused has a right to counsel at "critical" stages in the prosecution "where counsel's absence might derogate from the accused's right to a fair trial."³⁰ Specific pre-trial situations in which the right to counsel exists include lineups after indictment³¹ and custodial interrogations.³² However, no general right to counsel exists, except in custodial interrogations, before "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."³³ Moreover, even after adversary judicial proceedings have commenced, the right to counsel only attaches when a "trial-like confrontation" is present.³⁴

24. See *Arizona State Dept. of Pub. Welfare v. Barlow*, 80 Ariz. 249, 296 P.2d 298 (1956).

25. Note, *supra* note 8, at 803-04.

26. Note, *Civil Commitments: Should There be a Constitutional Right to Counsel*, 2 CAP. U.L. REV. 126 (1973).

27. 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974). The court later refused to extend *Fisher* to civil contempt proceedings. *In re Calhoun*, 47 Ohio St. 2d 15, 350 N.E.2d 665 (1976).

28. See Annot., 87 A.L.R.2d 950 (1963). Given the far-reaching consequences of an adjudication of incompetency, a right to counsel seems quite appropriate. See generally Dewey, *Civil Incompetency in Ohio: Determination and Effect*, 34 U. CIN. L. REV. 419 (1965).

29. 388 U.S. 218 (1967).

30. *Id.* at 226.

31. *Id.*

32. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

33. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). See also *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

34. *United States v. Ash*, 413 U.S. 300, 314 (1973).

If the accused does not prevail at trial, he has an absolute right to counsel in an appeal as of right,³⁵ but not in a discretionary appeal.³⁶ It is as yet unclear whether the Constitution requires counsel in postconviction proceedings commenced after the exhaustion of appeals.³⁷ Ohio, however, has required counsel in these proceedings by statute.³⁸ Finally, the United States Supreme Court has stated that a right to counsel may exist at probation and parole-revocation hearings, depending on the need for counsel in each individual case, but has refused to recognize an absolute right to counsel at these hearings.³⁹

C. *For What Types of Clients?*

It has never been seriously suggested that a right to publicly provided counsel extends to those who are readily able to procure private counsel. In *Powell v. Alabama*,⁴⁰ the first Supreme Court case to recognize a right to publicly provided counsel, the Court spoke of defendants "unable to employ counsel."⁴¹ In later cases, the Court referred to defendants who were "poor"⁴² and "too poor to hire a lawyer."⁴³

More troublesome than finding agreement on the general proposition that only those unable to obtain private counsel are entitled to publicly provided counsel is attempting to draw a line between those who are so entitled and those who are not. Courts have generally focused on indigency as the standard of eligibility but have had difficulty in more specifically defining this standard.⁴⁴ The United States Supreme Court has provided little direct guidance in solving this problem.⁴⁵ In a little-noticed footnote in his concurring opinion in *Hardy v. United States*,⁴⁶ Mr. Justice Goldberg did suggest a thoughtful

35. *Douglas v. California*, 372 U.S. 353, 357 (1963).

36. *Ross v. Moffitt*, 417 U.S. 600 (1974).

37. See Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 500-01 (1969).

38. OHIO REV. CODE ANN. § 2953.24 (Page 1975). This section was repealed by the Ohio Public Defender Act, but the right to counsel in asserting a claim for postconviction relief is retained under the Act. *Id.* § 120.06(A)(4) (Page 1978).

39. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). *Cf. Mempa v. Rhay*, 389 U.S. 128 (1967) (recognizing right to counsel in post-trial proceeding for revocation of probation and imposition of deferred sentence in the case of a felony defendant).

40. 287 U.S. 45 (1932).

41. *Id.* at 71.

42. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

43. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

44. Annot., 51 A.L.R.3d 1108 (1973).

45. Mr. Justice Douglas suggested a need to examine liabilities as well as assets in his dissent in *United States v. Kahan*, 415 U.S. 239, 244-45 (1974) (Douglas, J., dissenting); Mr. Justice Powell merely referred to the problem in his concurring opinion in *Argersinger v. Hamlin*, 407 U.S. 25, 50 (1972) (Powell, J., concurring).

46. 375 U.S. 277, 289 n.7 (1964) (Goldberg, J., concurring).

general test for determining indigency. He stated that an accused should be deemed indigent when his lack of means "substantially inhibits or prevents the proper assertion" of his right or claim, and that a person can be indigent without being "totally devoid of means."⁴⁷ Courts throughout the United States, at both the federal and state levels, have generally formulated broad criteria for determining whether an accused is sufficiently needy to be entitled to publicly provided counsel. They typically examine the accused's entire financial situation, including his assets, liabilities, income, and expenses, to determine whether he lacks the financial means to retain an attorney.⁴⁸ In addition, most courts have refused to consider the financial resources of relatives and friends of the accused, limiting the inquiry to the accused himself.⁴⁹

The Supreme Court of Ohio dealt with the problem of eligibility for publicly provided counsel in *State v. Tymcio*.⁵⁰ The court held that the right "depends, not upon whether the accused ought to be able to employ counsel, but whether he is in fact 'unable to employ counsel.'"⁵¹ Although the reason for an inability to obtain counsel is usually insufficient financial means, that is not the only possible reason. A potential client may have such a notorious criminal reputation or unpopular political beliefs that members of the private bar simply refuse to provide legal services, even though compensation would ensue.⁵² *Tymcio* is significant for its extension of the obligation to provide counsel to persons other than the indigent: "When an accused is financially able, in whole or in part, to obtain the assistance of counsel, but is unable to do so *for whatever reason*, appointed counsel must be provided. In such case, appropriate arrangements may subsequently be made to recompense appointed counsel for legal services rendered."⁵³ The *Tymcio* court did not specifically deal with criteria for determining eligibility in the typical case of a claimed financial need. Nonetheless, the court's expansive approach to "inability to obtain counsel" suggests that the Ohio Supreme Court would use a liberal test in determining whether financial inability is present.

47. *Id.*

48. Annot., 51 A.L.R.3d 1108, 1111-14 (1973); see, e.g., *In re Smiley*, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967). Cf. *Duke*, *supra* note 8, at 628 (suggesting a liberal approach for defining indigency, based on whether the cost of a defense would impose a substantial hardship on the accused or his family). See also Comment, *The Definition of Indigency: A Modern Day Legal Jabberwocky?*, 4 ST. MARY'S L.J. 34 (1972).

49. Annot., 51 A.L.R.3d 1108, 1114-16 (1973).

50. 42 Ohio St. 2d 39, 325 N.E.2d 556 (1975), *appeal dismissed*, 423 U.S. 993 (1975).

51. *Id.* at 39, 325 N.E.2d at 557.

52. This is true despite an ethical consideration to the contrary in the Code of Professional Responsibility. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-27 (1976).

53. 42 Ohio St. 2d at 45, 325 N.E.2d at 561 (emphasis added).

III. REPRESENTATION UNDER THE OHIO ACT

As the constitutional right to counsel was increasingly expanded, Ohio's method for providing the mandated legal services became increasingly inadequate. Under Ohio law prior to 1975,⁵⁴ the state had no uniform system of public defender representation. Although larger municipalities had public defender offices, much of the state used appointed counsel to represent indigents.⁵⁵ The state reimbursed counties for the cost of counsel fees and expenses only in felony cases that resulted in conviction.⁵⁶ These prerequisites to reimbursement risked prejudicing the rights of indigent defendants. County prosecutors desiring state reimbursement for their counties might have felt pressured to charge indigents with felonies rather than misdemeanors. For similar reasons, local judges might have been induced to make findings and give instructions more likely to result in conviction when an indigent was the accused. Thus, these provisions were of questionable constitutional validity.⁵⁷ In any case, a system generally relying on the appointment of private attorneys to fill an ever-increasing need for legal services was outmoded and inefficient.

By the time the Ohio Legislature acted in 1975, enacting the Ohio Public Defender Act, a number of states had already responded to the constitutional pressures for publicly provided counsel with comprehensive legislation providing for public defender representation.⁵⁸ In many of these states, a state-level public defender or agency simply provides statewide legal services.⁵⁹ Other states allow more local control by having county or district-level defenders in addition to a state defender or agency.⁶⁰ At least one state, Florida, retains local autonomy in a most direct way; the state has no state-level program at all, and its local defenders are publicly elected officials.⁶¹

54. See OHIO CRIM. R. 44 (Page 1975); OHIO REV. CODE ANN. §§ 2941.50-.51, 2949.15, .19 (Page 1975). Section 2941.50, relating to the appointment of assigned counsel, was repealed by the Ohio Public Defender Act. The Act amended § 2941.51, relating to the payment of assigned counsel. Sections 2949.15 and 2949.19, relating to state reimbursement of the county-paid counsel fees, were not affected by the Act.

55. Interview with State Representative Harry J. Lehman, legislative sponsor of the Ohio Public Defender Act, in Columbus, Ohio (Oct. 20, 1977).

56. OHIO REV. CODE ANN. §§ 2941.51; 2949.15, .19 (Page 1975). For the extent to which the passage of the Ohio Public Defender Act affected these sections, see note 54 *supra*.

57. See *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.").

58. The United States Congress also created a public defender program at the federal level. 18 U.S.C. § 3006A(h) (1970).

59. *E.g.*, ALASKA STAT. §§ 18.85.010-.180 (1974 & Supp. 1976); DEL. CODE ANN. tit. 29, §§ 4601-07 (1975 & Supp. 1977); HAW. REV. STAT. §§ 802-1 to -12 (1976); MASS. ANN. LAWS ch. 221, § 34D (Michie/Law. Co-op 1974).

60. *E.g.*, CONN. GEN. STAT. ANN. §§ 51-289 to -300 (West Supp. 1977); KY. REV. STAT. ANN. §§ 31.010-.240 (Baldwin 1975); MINN. STAT. ANN. §§ 611.12-.35 (West 1964 & Supp. 1977).

61. FLA. STAT. ANN. §§ 27.50-.59 (West 1974 & Supp. 1977).

Despite the existence of these numerous potential statutory models, the Ohio Act was drafted largely *sui generis*.⁶² The result is a hybrid system including a state public defender and local public defenders, but still retaining a county-level option for a system utilizing court appointed private attorneys.⁶³ Supervising the entire system for providing legal services is the Ohio Public Defender Commission.⁶⁴ This general representation scheme uniquely and sensitively balances state and local interests, allowing substantial local control but retaining a strong state role in both representation and supervisory functions.

Under the Act, counties may elect to establish a county public defender office⁶⁵ or to join with another county or counties in the establishment of a joint county public defender office.⁶⁶ Whether a public defender office is established on a county or joint county basis does not affect the types of representation to be provided, because county public defenders are governed by representation provisions virtually identical to those for joint county public defenders.⁶⁷ Counties are also given the option of instituting an assigned counsel system utilizing private attorneys.⁶⁸ This option is particularly attractive to rural counties lacking the need for a full-time public defender.⁶⁹ Regardless of the manner used to provide local-level legal services, counties receive fifty percent state reimbursement for the cost of the services provided.⁷⁰

In addition to this locally provided counsel, the Act creates the Office of the State Public Defender that has a two-prong role of coordination and representation. The coordination function consists of overseeing the local representation systems.⁷¹ The representation function consists of directly providing legal services in certain types of cases.⁷²

The Act delineates the representation functions to be performed at each level in the representation scheme.⁷³ It contains provisions for mandatory and permissive⁷⁴ representation by the state public de-

62. Interview with State Representative Harry J. Lehman, *supra* note 55.

63. OHIO REV. CODE ANN. §§ 120.04, .15, .25, .33 (Page 1978).

64. *Id.* §§ 120.01-.03.

65. *Id.* §§ 120.13-.15.

66. *Id.* §§ 120.23-.25.

67. *Id.* §§ 120.16, .26.

68. *Id.* § 120.33.

69. According to the Act's legislative sponsor, the special needs of rural counties were a major impetus for adding the assigned counsel option to the legislation. Interview with State Representative Harry J. Lehman, *supra* note 55.

70. OHIO REV. CODE ANN. §§ 120.18, .28, .33(D) (Page 1978).

71. *Id.* § 120.04.

72. *Id.* § 120.06.

73. *Id.* §§ 120.06, .16-.17, .26-.27.

74. The terms "mandatory" and "permissive" will be used to describe statutory provisions using the terms "shall" and "may" respectively. In fact, even the "mandatory" provisions are

fender and by local public defenders, and states in what circumstances a defender must be designated by a court (in effect, appointed)⁷⁵ before proceeding in any particular instance. These mandatory and permissive provisions deal specifically both with the types of cases in which representation is either required or authorized, and with the stages of the various proceedings at which the representation must or may attach. The Act is less specific in prescribing the types of cases and stages of proceedings in which representation is to be provided under the county-level assigned private counsel option. Finally, the Act contains language concerning indigency as a possible prerequisite to representation and prescribes the manner in which indigency is to be determined.

These representation provisions present serious problems of statutory interpretation. Many provisions are susceptible to divergent interpretations, or are apparently rendered meaningless by other parts of the statute. In addition, the provisions must be evaluated in light of the constitutional requirements for providing legal services. Constitutional criticisms and evaluations appropriate for the state public defender provisions are often equally appropriate for similar local public defender language.⁷⁶

A. *Representation by the State Public Defender*

1. *Mandatory Representation*

Section 120.06 is the principal provision authorizing representation by the state public defender.⁷⁷ Division (A) sets forth three *prima*

not mandatory in an absolute sense, because the Act allows a public defender to refuse to provide representation even in a "mandatory" case if he does not find "arguable merit" to the proceeding. *Id.* §§ 120.06(C), .16(D), .26(D). See text accompanying notes 81 and 102 *infra*.

75. A court's decision to designate a public defender as counsel is guided by constitutional standards for providing counsel, as well as by the court's discretion to appoint either a public defender or a private attorney. See text accompanying note 84 *infra*.

76. Compare OHIO REV. CODE ANN. § 120.06(A) with § 120.16(A) and § 120.26(A) (Page 1978). The consequences of the constitutional issues, however, are usually more significant at one level or the other, depending especially on whether the particular provisions are mandatory or permissive. For example, while the state public defender has permissive representation authority in "serious offense" prosecutions and in any proceeding that might result in a loss of liberty, the local public defender provisions call for mandatory representation in the same circumstances. The Act's constitutional character concerning these types of cases can best be judged by examining the more far-reaching provisions, *i.e.*, the local public defender provisions which are mandatory, not merely permissive.

77. OHIO REV. CODE ANN. § 120.06 (Page 1978) provides:

(A)(1) The state public defender, when designated by the court or requested by a county or joint county public defender, may provide legal representation in all courts throughout the state to indigent persons charged with the commission of a serious offense as defined in the Rules of Criminal Procedure.

(2) In all courts throughout the state the state public defender, when designated by the court or requested by a county or joint county public defender, may represent juveniles, persons whose competency is being determined, or is to be determined, by the probate court, and all other persons in any proceeding the outcome of which could result in the loss of liberty.

facie "mandatory" representation provisions and three permissive ones. The state public defender "shall" represent prisoners asserting unlawful imprisonment, persons committed or detained pending commitment to a state mental institution, and—when designated by a court or requested by a local public defender or by the Director of the Department of Rehabilitation and Correction—parolees and probationers facing possible parole or probation revocation.⁷⁸ Standing alone, these "mandatory" provisions seem clear, maintaining Ohio's

(3) The state public defender shall provide legal representation to persons committed to Lima state hospital or a state mental institution, or detained pending such commitment, in any matter in which the person may assert that he is unlawfully committed or detained.

(4) The state public defender shall provide legal representation to any person incarcerated in any penal institution of the state, in any matter in which the person asserts he is unlawfully imprisoned or detained.

(5) The state public defender, in any case in which he has provided legal representation or is requested to do so by a county or joint county public defender, may provide legal representation on appeal.

(6) The state public defender shall, when designated by the court or requested by a county or joint county public defender or the director of the department of rehabilitation and correction, provide legal representation in parole and probation revocation matters.

[B] The state public defender may prosecute any appeal or other remedy before or after conviction that he decides is in the interest of justice.*

(C) The state public defender shall not be required to prosecute any appeal, postconviction remedy, or other proceeding pursuant to divisions (A)(3), (A)(4), (A)(5), and (A)(6) of this section, unless he is first satisfied that there is arguable merit to the proceeding.

(D) A court may appoint counsel to assist the state public defender as co-counsel when the interests of justice so require. When co-counsel is appointed to assist the state public defender, such counsel shall receive such compensation as the court may approve, not to exceed the amounts provided for in section 2941.51 of the Revised Code.

* Enclosed material disapproved October 14, 1975 by Governor James Rhodes.

A "sleeping giant" mandatory state public defender representation provision is found in statutory provisions concerning the relationship between state and local public defender representation. See text accompanying notes 124-27 *infra*.

78. In the case of persons confined or threatened with confinement in a state mental institution, there is overlapping representation authority in another Ohio agency. Under OHIO REV. CODE ANN. § 5123.94(A), (G) (Page Supp. 1977), the Ohio Legal Rights Service has very broad power to initiate such "legal and equitable remedies as may be necessary to accomplish the purposes of [chapters 5122 and 5123 (hospitalization of the mentally ill and mentally retarded)] of the Revised Code" in its representation of persons "detained, hospitalized, discharged, or institutionalized, and . . . persons whose detention, hospitalization, discharge, or institutionalization is sought or has been sought under [these chapters]."

Under these provisions, the Legal Rights Service has the authority to represent, among others, persons who could also be represented pursuant to § 120.06(A)(3), which provides that the "state public defender shall provide legal representation to persons committed to Lima state hospital or a state mental institution, or detained pending such commitment, in any matter in which the person may assert that he is unlawfully committed or detained." Apparently, persons falling within the terms of § 120.06(A)(3) can request representation by either the state public defender or the Legal Rights Service. (Indigency, although not specifically mentioned, may be required for § 120.06(A)(3) representation. See text accompanying notes 131-50 *infra*.) Other persons involved in proceedings under chapters 5122 and 5123 are limited to Legal Rights Service representation pursuant to § 5123.94.

This overlapping representation authority precludes either agency from fully developing an expertise by handling all of the cases in this area when the state is to provide counsel. Although it might be possible for the two legal agencies to institute a cooperative arrangement, see OHIO REV. CODE ANN. §§ 120.04(C)(3), 5123.94(G) (Page 1978 & Supp. 1977), the best solution to the overlap problem would be corrective legislation.

codified right to counsel in postconviction proceedings⁷⁹ and providing representation in response to decisions of the Supreme Court of Ohio and the United States Supreme Court regarding mental commitments and parole and probation revocation.⁸⁰

Division (C) of section 120.06, however, impugns the Act's constitutional character, at least in the case of mental commitments and parole and probation revocations,⁸¹ by stating that even "mandatory" representation by the state public defender does not require him to participate in any proceeding "unless he is first satisfied that there is arguable merit to the proceeding." The Supreme Court of Ohio did not allow an "arguable merit" determination as a prerequisite to representation in mental commitment cases,⁸² and the United States Supreme Court stated that the decision of whether counsel would be necessary at parole or probation-revocation hearings was to be made "by the state authority charged with responsibility for administering the probation and parole system,"⁸³ not by the potential provider of the legal services. The Act is probably not unconstitutional in these representation provisions, because it expressly eschews limiting a judge's power to appoint private counsel.⁸⁴ Because a judge can appoint a private attorney when the Constitution requires representation, the Act permits full compliance with constitutional mandates outside the basic public defender structure. Nonetheless, to the extent that a judge must resort to the appointment of private counsel, the Act fails to supply a systematic and efficient method for providing constitutionally mandated legal services.

2. *Permissive Representation*

Two of section 120.06(A)'s permissive provisions present an obvious drafting oversight. Subdivisions (1) and (2) of division (A) set forth occasions on which the state public defender may provide representation if designated by a court or requested by a local public defender. Subdivision (1) grants permission to represent "indigent per-

Because it is limited to persons detained or committed, and is further limited to state mental institutions, § 120.06(A)(3) leaves a gap in the public defender system's mandatory representation of persons threatened with mental commitments. This gap is filled by local public defender representation. See text accompanying notes 112-16 *infra*.

79. See OHIO REV. CODE ANN. § 2953.24 (Page 1975), which was repealed with the enactment of the Ohio Public Defender Act.

80. See notes 27 and 39 *supra* and accompanying text.

81. Representation in postconviction proceedings may not be constitutionally required at all. See note 37 *supra* and accompanying text. Therefore, the Act's provisions pertaining to postconviction proceedings may not be subject to constitutional criticism.

82. In re Fisher, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974).

83. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

84. OHIO REV. CODE ANN. §§ 120.16(E), .26(E) (Page 1978). The private counsel's fees and expenses would be paid by the county, which would receive fifty percent reimbursement from the state. See *id.* § 2941.51 (Page Supp. 1977).

sons charged with the commission of a serious offense.”⁸⁵ Subdivision (2) authorizes representation of “juveniles, persons whose competency is being determined, or is to be determined, by the probate court, and all other persons in any proceeding the outcome of which could result in the loss of liberty.” The difficulty stems from the broad “loss of liberty” phrase in subdivision (2); this language appears to include all cases covered by subdivision (1), thus rendering subdivision (1) meaningless and unnecessary.⁸⁶

The third permissive provision in section 120.06(A) is contained in subdivision (5) and provides that the “state public defender, in any case in which he has provided legal representation or is requested to do so by a county or joint county public defender, may provide legal representation on appeal.” A related provision appears in section 120.03(C)(1)(c), which states that any person “entitled to legal representation by the state public defender may elect representation on appeal . . . by such office to supersede a county or joint county public defender, court appointed local counsel, or other counsel then providing legal representation for such person.”⁸⁷ These two provisions appear to represent opposite policy determinations. Section 120.06(A)(5) suggests that the state public defender’s appellate representation function is limited to cases in which he has provided representation in the court below, or in which he has been requested by a local public defender to provide appellate services. On the other hand, section 120.03(C)(1)(c) implies that representation by the state public defender may be requested by a defendant to supersede local-level defense, even if not requested by a local public defender. These provisions can best be reconciled by reading each provision as a separate and sufficient authorization for permissive appellate representation, although the legislative intent is unclear.

These permissive appellate representation provisions for the state public defender are both broader and narrower than what United

85. A “serious offense” is defined in the Ohio Rules of Criminal Procedure as “any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.” OHIO CRIM. R. 2 (Page 1975).

86. One way to read subdivision (1) to have independent meaning is to interpret the broad phrase in subdivision (2) as referring back to earlier parts of (2), *i.e.*, as being applicable only to matters involving juveniles or competency determinations. This interpretation, however, runs counter to the broad and explicit language in (2). Moreover, similar language providing for *mandatory* local public defender representation must be read independently (as opposed to “referring back”) in order to meet the requirements of *Argersinger v. Hamlin*, 407 U.S. 25 (1972). See OHIO REV. CODE ANN. §§ 120.16(A)(3), .26(A)(3) (Page 1978). See text accompanying notes 103-05 *infra*. In sum, the language of section 120.06(A)(2) cannot easily be read in a manner that does not render (A)(1) superfluous.

Subdivision (2) also provides for permissive representation, upon court designation, beyond what the courts have required. Because there are parallel mandatory provisions for local public defenders, the extension beyond constitutionally required representation will be dealt with in connection with those provisions. See text accompanying notes 103-16 *infra*.

87. OHIO REV. CODE ANN. § 120.03(C)(1)(c) (Page 1978).

States Supreme Court decisions have required.⁸⁸ Although the Supreme Court has refused to recognize a general right to counsel in discretionary appeals,⁸⁹ the Ohio Act clearly authorizes this representation. On the other hand, the Constitution does require counsel in *all* appeals as of right.⁹⁰ The state public defender's discretion in appeals as of right is probably not unconstitutional, because representation by appointed private counsel is not precluded.⁹¹ Nonetheless, because no mandatory appellate representation is provided either at the state or local defender level,⁹² the Act does leave an area in which appointed private counsel will be constitutionally required.⁹³

Division (B) of section 120.06 also contains permissive representation authority: the "state public defender may prosecute any appeal or other remedy before or after conviction that he decides is in the interest of justice." This extremely broad authority, going far beyond any constitutional mandate, could fairly be read to allow the state public defender to institute any action on behalf of a client. This might include, for example, a civil action against prison officials for money damages or injunctive relief. This division, however, may be without force because of an "item veto" by the Governor of Ohio. Article II, section 16 of the Ohio Constitution allows item vetoes of "any item or items in any bill making an appropriation of money."⁹⁴ The validity of the Governor's attempted veto of section 120.06(B) is unclear for two reasons. First, it can be argued that the "contingent appropriation" contained in section 4 of the Ohio Public Defender Act, *i.e.*, an "appropriation" designated in the Act as one that was contingent upon the availability of funds from specified sources, was not an appropriation at all, and the legislation was therefore not a "bill making an appropriation of money" within the meaning of article II, section 16 of the Ohio Constitution.⁹⁵ Second, although an Ohio Attorney General Opinion has expressed the contrary view,⁹⁶ one could argue that vetoes of nonappropriation items, even in a bill making an appropriation, are not within the intended purpose of the con-

88. See notes 35-36 *supra* and accompanying text.

89. *Ross v. Moffitt*, 417 U.S. 600 (1974).

90. *Douglas v. California*, 372 U.S. 353 (1963).

91. See *Fredericks v. Reincke*, 152 Conn. 501, 208 A.2d 756 (1965); *McLaughlin v. State*, 32 Wis. 2d 124, 145 N.W.2d 153 (1966), *cert. denied*, 389 U.S. 862 (1967). But see *Davis v. Wilson*, 278 F. Supp. 852 (C.D. Cal. 1968), *aff'd per curiam sub nom. Nelson v. Davis*, 414 F.2d 1364 (9th Cir. 1969).

92. See text accompanying notes 119-20 *infra*.

93. See *Fredericks v. Reincke*, 152 Conn. 501, 208 A.2d 756 (1965); *McLaughlin v. State*, 32 Wis. 2d 124, 145 N.W.2d 153 (1966), *cert. denied*, 389 U.S. 862 (1967). But see *Morris v. State*, 189 So. 2d 901 (Fla. App. 1966).

94. OHIO CONST. art. II, § 16.

95. See *Menz v. Coyle*, 117 N.W.2d 290, 302 (N.D. 1962) (An "appropriation . . . is the setting apart of a definite sum for a specific object in such a way that the public officials can use the amount appropriated, and no more than the amount appropriated.").

96. OP. OHIO ATT'Y GEN. 75-059 (1975).

stitutional provision. The force of section 120.06(B)'s far-reaching authorization thus remains in doubt.⁹⁷

B. *Representation by Local Public Defenders*

Whether a locality is served by a county or joint county public defender, the local public defender has the same basic representation duties and authority, as a result of parallel sections created by the Ohio Public Defender Act. Section 120.16 relates to county public defenders,⁹⁸ and section 120.26 to joint county public defenders.⁹⁹ The sections are identical in all pertinent respects.

97. In addition to the general representation provisions that have been discussed, the state public defender may take on matters left pending in counties that have terminated local public defender programs. OHIO REV. CODE ANN. §§ 120.13(E), .23(H) (Page 1978).

98. OHIO REV. CODE ANN. § 120.16 (Page 1978) provides:

(A)(1) The county public defender shall provide legal representation to indigent persons charged with the violation of a state statute that is a serious offense as defined in the Rules of Criminal Procedure, and in postconviction proceedings as hereinafter defined.

(2) The county public defender may provide legal representation to indigent persons charged with the violation of an ordinance of a municipal corporation that is a serious offense as defined in the Rules of Criminal Procedure, if the county public defender commission has contracted with the municipal corporation to provide legal representation for indigent persons charged with a violation of an ordinance of the municipal corporation.

(3) The county public defender shall represent, when designated by the court, juveniles, other than juveniles charged with the violation of a municipal ordinance, persons whose competency is being determined, or is to be determined, by the probate court, and all other persons, except persons charged with the violation of a municipal ordinance, in any proceeding with the outcome of which could result in the loss of liberty.

(4) The county public defender may, when designated by the court, provide legal representation to juveniles and other persons charged with the violation of an ordinance of a municipal corporation, if the county public defender commission has contracted with the municipal corporation to provide legal representation for indigent persons charged with a violation of an ordinance of the municipal corporation.

(B) The county public defender shall provide the legal representation authorized by division (A) of this section at every stage of the proceedings following arrest, detention, service of summons, or indictment.

(C) The county public defender may request the state public defender to prosecute any appeal or other remedy before or after conviction that he decides is in the interests of justice, and may provide legal representation in parole and probation revocation matters.

(D) The county public defender shall not be required to prosecute any appeal, postconviction remedy, or other proceeding, unless he is first satisfied there is arguable merit to the proceeding.

(E) Nothing in this section shall prevent a court from appointing counsel other than the county public defender. A court may also appoint counsel to assist the county public defender as co-counsel when the interests of justice so require.

(F) Information as to the right to legal representation by the county public defender shall be afforded to an accused person immediately after being taken into custody, when brought before a magistrate, or when formally charged, whichever occurs first.

99. OHIO REV. CODE ANN. § 120.26 (Page 1978) provides:

(A)(1) The joint county public defender shall provide legal representation to indigent persons charged with the violation of a state statute that is a serious offense as defined in the Rules of Criminal Procedure and in postconviction proceedings as hereinafter defined.

(2) The joint county public defender may provide legal representation to indigent

1. *Mandatory Representation*

Division (A) of each section sets forth two *prima facie* "mandatory" representation provisions.¹⁰⁰ The first provision, found in subdivision (1), requires representation even without court designation, of persons charged with a serious offense under state law. The second mandatory provision, in subdivision (3), is limited to cases in which the local public defender has been designated by a court. Under subdivision (3), the public defender is required, except in municipal ordinance matters, to represent juveniles, persons whose competency is being tested in probate court, and "all other persons . . . in any proceeding the outcome of which could result in the loss of liberty."

These two "mandatory" provisions avoid the drafting problem previously discussed in reference to the parallel permissive state public defender provisions, under which the state public defender's broad "loss of liberty" authority appears to render his "serious offense" authority superfluous.¹⁰¹ As to the local public defenders, however,

persons charged with the violation of an ordinance of a municipal corporation that is a serious offense as defined in the Rules of Criminal Procedure, if the joint county public defender commission has contracted with the municipal corporation to provide legal representation for indigent persons charged with a violation of an ordinance of the municipal corporation.

(3) The joint county public defender shall represent, when designated by the court, juveniles, other than juveniles charged with the violation of a municipal ordinance, persons whose competency is being determined, or is to be determined, by the probate court, and all other persons, except persons charged with the violation of a municipal ordinance, in any proceeding the outcome of which could result in the loss of liberty.

(4) The joint county public defender may, when designated by the court, provide legal representation to juveniles and other persons charged with the violation of an ordinance of a municipal corporation, if the joint county public defender commission has contracted with the municipal corporation to provide legal representation for indigent persons charged with a violation of an ordinance of the municipal corporation.

(B) The joint county public defender shall provide the legal representation authorized by division (A) of this section at every stage of the proceedings following arrest, detention, service of summons, or indictment.

(C) The joint county public defender may request the Ohio public defender to prosecute any appeal or other remedy before or after conviction that he decides is in the interests of justice and may provide legal representation in parole and probation revocation matters.

(D) The joint county public defender shall not be required to prosecute any appeal, postconviction remedy, or other proceeding, unless he is first satisfied that there is arguable merit to the proceeding.

(E) Nothing herein shall prevent a court from appointing counsel other than the joint county public defender. A court may also appoint counsel to assist the joint county public defender as co-counsel when the interests of justice so require.

(F) Information as to the right to legal representation by the joint county public defender shall be afforded to an accused person immediately after being taken into custody, when brought before a magistrate, or when formally charged, whichever comes first.

100. Division (C) of each section allows a local public defender to request that the state public defender take over the prosecution of an appeal or other remedy before or after conviction. Presumably, state-level representation pursuant to such a request would satisfy the local public defender's responsibilities under these and other mandatory provisions in §§ 120.16 and 120.26.

101. See text accompanying notes 85-86 *supra*.

because of the requirement of court designation under subdivision (3) but not under subdivision (1), subdivision (1) has independent importance; it allows the local public defender to act in serious offenses (but not in all "loss of liberty" situations) without first being named by a court.

On the other hand, because division (D) of sections 120.16 and 120.26 states that no appeal or other proceeding need be prosecuted unless the public defender sees "arguable merit" to the proceeding, the local public defender "mandatory" provisions are subject to the constitutional criticism suggested for "mandatory" state public defender representation.¹⁰² That is, even though the Act is not unconstitutional (because private counsel may be appointed), the Act's systematic effectiveness is weakened when constitutionally mandated legal representation can be refused by a public defender.

Putting aside a possible refusal to represent a client pursuant to division (D), the two mandatory local public defender provisions in division (A) provide for representation that is consistent with a liberal reading of *Argersinger v. Hamlin*.¹⁰³ The mandate of *Argersinger* has been variously interpreted to require representation (1) only if actual imprisonment has resulted, (2) not only in cases of actual incarceration, but also in prosecutions for serious offenses with significant penalties authorized by statute, or (3) in any case in which imprisonment, however short, is possible. While the first two interpretations have found general acceptance, the third interpretation seems to be held by an extreme minority.¹⁰⁴

Ohio's mandatory provisions for local public defender representation are apparently designed to comport with the second, "middle ground" interpretation of *Argersinger*, which requires representation not only in cases of actual incarceration but also in prosecutions for serious offenses. Subdivision (A)(1) of sections 120.16 and 120.26 requires public defender representation (even without court designation) in the case of serious offenses. This subdivision must be read to require representation irrespective of the actual penalty that results, even if the judge has indicated before trial that no incarceration penalty will be imposed. Under the "loss of liberty" language in subdivision (A)(3), however, a court could decide not to designate a public defender in a prosecution for a nonserious offense with an incarceration penalty authorized by statute, thereby forfeiting his right to impose an incarceration penalty if a conviction resulted in the absence of defense counsel. Of course, a court could choose to designate a public defender under subdivision (A)(3) even if the judge had no in-

102. See text accompanying notes 81-84 and 88-93 *supra*.

103. 407 U.S. 25 (1972).

104. See notes 19-21 *supra* and accompanying text.

tention of ordering incarceration, thus in effect, giving the defendant the benefit of the third and most liberal interpretation of *Argersinger*.

Subdivision (A)(3)'s "loss of liberty" language also goes beyond any reading of *Argersinger* by requiring representation, contingent upon court designation, in *any* proceeding that could result in a loss of liberty. The provision is not limited to criminal offenses, as was *Argersinger*, and could extend to any type of potential commitment or incarceration.¹⁰⁵ Of course, the need for court designation provides a limiting check on this otherwise broad provision.

As to matters involving juveniles, subdivision (A)(3) of sections 120.16 and 120.26 reflects the constitutional need for representation under the Supreme Court's decision in *In re Gault*.¹⁰⁶ This subdivision provides for mandatory representation of juveniles by local public defenders upon court designation.¹⁰⁷ One could carefully examine chapter 120 and conclude that no public defender representation of a juvenile's *parents* is authorized, even when the result of a proceeding might require the parents to involuntarily release the child into state custody.¹⁰⁸ However, the Ohio Public Defender Act also amended portions of chapter 2151 (Juvenile Court) of the Ohio Revised Code.¹⁰⁹ As amended by the enactment, sections 2151.28(C), 2151.314, and 2151.352¹¹⁰ provide for the representation of parties, including parents, pursuant to chapter 120. County and joint county public defender—but not state public defender—representation is explicitly mentioned. Although the language in sections 2151.28, 2151.314, and 2151.352 clearly authorizes, and apparently mandates, local public defender involvement on behalf of parents,¹¹¹ sections 120.16 and

105. Cf. *In re Calhoun*, 47 Ohio St. 2d 15, 350 N.E.2d 665 (1976). In *Calhoun*, decided after the enactment of the Ohio Public Defender Act, the Supreme Court of Ohio held that legal representation is *not constitutionally required* in civil contempt proceedings.

106. 387 U.S. 1 (1967).

107. This prerequisite of court designation does not affect the constitutional sufficiency of the Act, so long as the court utilizes constitutional standards in determining whether to designate a public defender. See note 75 *supra*. The designation requirement does preclude public defender involvement in the absence of court appointment. If, for example, the court wishes to appoint private counsel, the public defender need not and cannot act on behalf of a juvenile, even if the juvenile requests his services.

108. Ohio Revised Code § 2151.353, in conjunction with §§ 2151.03, 2151.031, and 2151.04, provides for the disposition of a child adjudged to be "abused," "neglected," or "dependent." Such disposition can include a commitment of the child into state custody. OHIO REV. CODE ANN. §§ 2151.353, .03, .031, .04 (Page 1976).

109. *Id.* §§ 2151.01-.99.

110. *Id.* §§ 2151.28(C), .314, .352.

111. It could be argued that the language of §§ 2151.28(C), 2151.314, and 2151.352, as amended, simply calls for representation within the literal confines of §§ 120.16 and 120.26. Such an interpretation, however, would require a very restricted reading of the statutes. Moreover, in such a weighty matter as the retention of the custody of one's own children, public policy should favor a liberal interpretation, thus allowing public defender representation. Because the language does not mention the state public defender, however, and because he has no specific authority provided elsewhere, he apparently is *not* authorized to represent parents.

120.26, the basic provisions for local public defender representation, should be amended to reflect this representation function.

Subdivision (A)(3) of sections 120.16 and 120.26 also provides for mandatory local public defender representation, upon court designation, of "persons whose competency is being determined, or is to be determined, by the probate court." This provision authorizes the representation mandated in mental commitment cases by the Supreme Court of Ohio in *Fisher*.¹¹² Because representation is authorized before detention has begun and even though an adjudication of incompetency could lead to commitment in an institution other than a state mental institution,¹¹³ the provision is broader than the state public defender's mandatory representation function in mental commitment cases. The state public defender's mandatory representation is limited to persons committed or detained pending commitment to a state mental institution.¹¹⁴ Moreover, because local public defender representation is not limited to commitment cases, it goes beyond what the Ohio Supreme Court or other courts have held to be constitutionally required,¹¹⁵ authorizing representation, for example, when the consequence of a determination of incompetency would be the appointment of a guardian.¹¹⁶ Here again, the requirement of court designation tightens the broad sweep of the subdivision.

Another mandatory provision appears in subdivision (A)(1) of sections 120.16 and 120.26, although its import is impossible to discern. The provision states that a local public defender is to provide representation "in postconviction proceedings as hereinafter defined." Unfortunately, the "hereinafter" definitions are nowhere to be found in the Act.

Division (B) of sections 120.16 and 120.26 contains mandatory language that is not found in the state public defender representation provisions.¹¹⁷ Division (B), which applies irrespective of whether the local public defender representation is initially undertaken pur-

112. In re *Fisher*, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974).

113. See OHIO REV. CODE ANN. § 5122.15(C) (Page Supp. 1977).

114. OHIO REV. CODE ANN. § 120.06(A)(3) (Page 1978). The function of the Ohio Legal Rights Service, discussed in note 78 *supra*, overlaps with the function of local public defenders as well as the state public defender. A cooperative arrangement might also be possible between a local public defender and the Ohio Legal Rights Service, see *id.* §§ 120.04(C)(3), .15(C), .25(C); 5123.94(G) (Page Supp. 1977), but again, the best solution would be legislative.

115. See note 28 *supra* and accompanying text.

116. See OHIO REV. CODE ANN. § 2111.02 (Page 1976).

117. The language is notably absent from the state public defender provisions in § 120.06, even though such language did apply to the state public defender in the bill as introduced. H.B. No. 164, 111th General Assembly (1975-76) (proposed § 120.07(B)). This omission has little apparent significance, because nothing in the Act precludes representation at all stages when the state public defender is authorized to provide representation in a certain type of case and because court mandates must be complied with if the representation is to be constitutionally adequate.

suant to mandatory or discretionary language, states that a local public defender "shall provide the legal representation authorized by division (A) of this section at every stage of the proceedings following arrest, detention, service of summons, or indictment." This language adequately provides for the pre-trial representation mandated by United States Supreme Court cases.¹¹⁸ The division could also be read to require local public defender representation after trial on even discretionary appeals, going beyond constitutional requirements for representation after trial.¹¹⁹

Division (D), however, allowing a local public defender to decline to prosecute appeals unless he believes they have arguable merit, suggests that appellate representation by the local public defender, like that by the state public defender,¹²⁰ is authorized but not absolutely required, regardless of whether the appeal is as of right or discretionary.

2. *Permissive Representation*

Subdivisions (A)(2) and (A)(4) of sections 120.16 and 120.26 authorize permissive representation by local public defenders under contract with a municipality in cases of alleged violations of municipal ordinances. As with the mandatory provisions for violations of state law, court designation is not required in the case of a serious offense but is required in other cases. These permissive provisions evidence a clear intent that municipalities themselves must provide for the representation of persons charged with violations of their ordinances, although they may—by contract—receive local public defender services paralleling the services available in the case of state offenses.¹²¹ Local public defenders are also authorized, but not required, as is the state public defender in certain cases,¹²² to provide representation in parole and probation-revocation matters.¹²³

118. See notes 29-34 *supra* and accompanying text.

119. See notes 35-39 *supra* and accompanying text.

120. See text accompanying notes 87-93 *supra*.

121. According to the legislative sponsor of the Ohio Public Defender Act, this legislative policy resulted from the belief that, because Ohio municipalities benefit from fine money received as a result of municipal ordinance convictions, the municipalities should bear the cost of any required publicly provided legal defense services in cases of alleged violations of these ordinances. Interview with State Representative Harry J. Lehman, *supra* note 55.

122. OHIO REV. CODE ANN. § 120.06(A)(6) (Page 1978). See text accompanying notes 77-84 *supra*.

123. OHIO REV. CODE ANN. §§ 120.16(C), .26(C) (Page 1978).

C. *Relationship Between State and Local Public Defender Representation*

Sections 120.17¹²⁴ and 120.27¹²⁵ defy easy explanation. The sections state that in counties where a local public defender office has been established, the state public defender "shall not be required to defend indigent persons . . . , except as set forth in division (A) of section 120.06 of the Revised Code or if the court finds that it is required in the interests of justice."¹²⁶ At first blush, the language seems clear enough. As a general rule, state public defender representation is not required (but would be permitted) in counties served by local public defenders. The general rule is then subject to two exceptions: (1) when section 120.06(A)'s mandatory representation provisions apply; and (2) when a court finds that the interests of justice so require.

A close analysis of sections 120.17 and 120.27, however, reveals that its apparent limit on mandatory state public defender activity in counties with local public defenders amounts to no meaningful limit at all, and in fact states an *additional* circumstance in which the state public defender can be required to step in. The first "exception" to the sections' "general rule" relates to mandatory representation pursuant to section 120.06(A), which in fact states *all* of the occasions on which the state public defender can be required to provide representation.¹²⁷ In other words, this section 120.06(A) "exception" effectively swallows up the "general rule." Thus, the other "exception," which provides for mandatory state public defender representation when a court finds it to be required in the interests of justice, provides a new and independent basis for requiring representation by the state public defender, a basis with potentially broad significance.

D. *Assigned Counsel Counties*

Section 120.33 authorizes counties to establish by resolution a sys-

124. *Id.* § 120.17 provides:

In any county in which the county commissioners choose to establish a county defender's office, the Ohio public defender shall not be required to defend indigent persons in that county, except as set forth in division (A) of section 120.06 of the Revised Code, or if the court finds that it is required in the interests of justice.

125. *Id.* § 120.27 provides:

In any counties in which the boards of county commissioners choose to establish a joint county public defender's office, the Ohio public defender shall not be required to defend indigent persons in those counties, except as set forth in division (A) of section 120.06 of the Revised Code, or if the court finds that it is required in the interests of justice.

126. *Id.* §§ 120.17, .27. (emphasis added). One difficulty with these provisions arises in attempting to reconcile them with § 120.03(C)(1)(c), which provides that a person entitled to legal representation by the state public defender may elect such representation to supersede that of a local public defender, thus suggesting a policy contrary to that expressed in §§ 120.17 and 120.27.

127. See text accompanying notes 77-84 *supra*.

tem of assigned counsel representation using private attorneys instead of local public defenders. The section in part provides: "The resolution shall include those provisions the county commissioners consider necessary to provide effective representation of indigent persons in any proceeding for which counsel is provided under this section."¹²⁸ Beyond this vague language, the section fails to prescribe when representation is to be provided in these counties. Presumably, the statute authorizes county-paid legal services (and partial state reimbursement) whenever the Constitution requires publicly provided representation.¹²⁹ In addition, because the option of an assigned counsel system serves as an alternative to local public defenders, it is arguable that any provisions authorizing local public defender representation beyond what is constitutionally required are implicitly contained in section 120.33. Denying a person in an assigned counsel county representation services available in a local public defender county might well constitute an unconstitutional denial of equal protection of the laws.¹³⁰

IV. THE REQUIREMENT OF INDIGENCY

The representation questions discussed above have been considered initially without regard to the financial means of potential clients. The Act's provisions relating to indigency are so poorly drafted that they are susceptible to three different interpretations concerning when indigency is required as a prerequisite to publicly provided representation. To the extent that indigency is required, however, the Act, supplemented by administrative rules adopted by the Ohio Public Defender Commission, provides for an efficient method of determining eligibility that allows consideration of all relevant financial factors.

A. *Is Indigency Required At All?*

The Act's indigency provisions are susceptible to three interpretations. They can be read to require indigency (1) only when the

128. OHIO REV. CODE ANN. § 120.33 (Page 1978).

129. See *id.* § 1.47(A).

130. U.S. CONST. amend. XIV. In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), the United States Supreme Court struck down a state statute imposing a duty upon certain unsuccessful criminal appellants to repay the cost of transcripts used on appeal. The Court held that the statute, which imposed the duty only upon persons who had been incarcerated after appeal, violated the equal protection clause of the fourteenth amendment. *Id.* at 308. The Court reasoned that avenues of appeal, once established by a state, "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Id.* at 310. This reasoning seems equally appropriate in the context of other important procedural devices established by a state, such as the availability of publicly provided counsel. Making this counsel available in one county but not another in otherwise identical circumstances would seem to represent an "unreasoned distinction" impeding "open and easy access to the courts," a distinction not permitted by the fourteenth amendment.

applicable representation provision explicitly mentions indigency, (2) in all cases, or (3) unless the client is unable to obtain private counsel for non-financial reasons. The first interpretation finds support in the "clear on its face" rule of statutory construction; a statute with language having a clear and obvious meaning will not be construed by the courts to have another meaning.¹³¹ The legislature clearly expressed its reason for creating the Ohio Public Defender Commission, the commission that oversees all representation under the Act: "There is hereby created the Ohio public defender commission to provide, supervise, and coordinate legal representation at state expense for indigent and other persons."¹³²

In addition, some provisions in the Act specifically mention indigency as a requirement for representation while other provisions do not.¹³³ Section 120.06, the basic representation provision for the state public defender, lists in division (A) six different occasions in which representation by the state public defender is authorized.¹³⁴ Subdivision (1) states that representation may be provided to "indigent persons charged with the commission of a serious offense."¹³⁵ The remaining five subdivisions make no reference to indigency. The clear implication from the presence of the modifying word "indigent" in only one of the six representation provisions is that the other five provisions do not require indigency. Sections 120.16 and 120.26, relating to local public defender representation, make similar distinctions, using the modifier "indigent" in subdivisions (A)(1) and (A)(2), but not in (A)(3) or (A)(4).¹³⁶ Section 120.33's express requirement of indigency in order to receive representation in an assigned counsel county lends further credence to the argument that indigency is not required in the absence of such express language.¹³⁷

In the face of this literal interpretation, which calls for non-indigent representation absent an express indigency requirement in the particular provision, there stands another canon of statutory construction: A statute should not be construed to reach an unreasonable or absurd result.¹³⁸ Results that are at least unreasonable, if not absurd,

131. *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944).

132. OHIO REV. CODE ANN. § 120.01 (Page 1978) (emphasis added).

133. A settled rule of statutory interpretation is *expressio unius est exclusio alterius*. (The expression of one is the exclusion of the other.) See *Board of Educ. v. Boal*, 104 Ohio St. 482, 485, 135 N.E. 540, 541 (1922).

134. OHIO REV. CODE ANN. § 120.06(A) (Page 1978).

135. *Id.* § 120.06(A)(1) (emphasis added).

136. *Id.* §§ 120.16, .26. Subdivision (A)(4) of these sections does, however, refer to indigency in its description of the type of contract required for providing services in cases of alleged violations of municipal ordinances.

137. *Id.* § 120.33. An equal protection problem is presented if, for example, representation is available to nonindigents in counties with local public defenders but not in those with assigned counsel systems. See note 130 *supra* and accompanying text.

138. *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968);

follow if the Act is read to require indigency only when the specific representation provision expressly requires it. Under subdivision (A)(1) of section 120.26, indigency is required in order for the state public defender to have the authority to represent persons charged with serious offenses. Under subdivision (A)(2), however, indigency is not required even though representation may be extended, under the broad "loss of liberty" provision, to persons charged with *nonserious* offenses having lesser potential penalties. The same type of anomaly occurs under subdivisions (A)(1) and (A)(3) of sections 120.16 and 120.26, relating to local public defender representation. Thus, under this interpretation of the Act, a millionaire charged with driving while intoxicated¹³⁹ could receive public defender representation under the "loss of liberty" provision in section 120.06(A)(2), 120.16(A)(3), or 120.26(A)(3).

In addition to these problematic results under a provision by provision determination of whether a requirement of indigency exists, the overall thrust of the Ohio Public Defender Act suggests a second interpretation of the statute: that indigency is required in all cases. First, the Act is a response to constitutional dictates generally applicable only to indigents.¹⁴⁰ Second, provisions in the Act relating to determinations of indigency suggest that it is uniformly required. Section 120.03(B)(1) directs the Ohio Public Defender Commission to establish standards "of indigency and minimum qualifications for legal representation by a public defender or appointed counsel."¹⁴¹ Section 120.05, in conjunction with sections 120.15(D) and 120.25(D), provides for determinations of indigency by the state or local public defender.¹⁴² Division (B) of section 120.05 provides that the public defender "shall investigate the financial status of *each* person to be represented at the earliest time the circumstances permit."¹⁴³ Division (C) provides that if a person provisionally receiving services prior to a determination of eligibility is found to be ineligible for services, the public defender "shall notify the person of the termination of his services." Division (D) states that a person able to afford *part* of the cost of public defender services shall pay such portion, but division (E) provides for *full* payment for services only if it is found that a person was in fact "not entitled" to services previously

State *ex rel.* Cooper v. Savord, 153 Ohio St. 367, 92 N.E.2d 390 (1950). See also OHIO REV. CODE ANN. § 1.47(C) (Page 1978).

139. See OHIO REV. CODE ANN. §§ 4511.19, .99(A) (Page 1973 & Supp. 1977).

140. See notes 40-49 *supra* and accompanying text. The Ohio Supreme Court's decision in *Tymcio* is an exceptional case. See text accompanying notes 50-53 *supra*.

141. OHIO REV. CODE ANN. § 120.03(B)(1) (Page 1978).

142. *Id.* §§ 120.05, .15(D), .25(D).

143. *Id.* § 120.05(B) (emphasis added).

rendered,¹⁴⁴ suggesting that a person fully able to afford private counsel is never entitled to public defender representation.

A third solution to the problem of whether indigency is required under the Act is the one most consonant with constitutional mandates and with basic notions of fairness and common sense. Under this view, representation is provided in the same circumstances suggested by the Supreme Court of Ohio in *Tymcio*,¹⁴⁵ i.e., whenever the person in need of legal services is unable to obtain private counsel for whatever reason. Normally, the reason is a lack of financial means, but the reason could be a notorious reputation, an unpopular political ideology, or some other personal characteristic causing private attorneys to decline to provide representation regardless of the client's ability to pay. Unfortunately, this third approach to the requirement of indigency does not find the statutory support available for either the first or the second suggested approaches. Furthermore, because the legislation was introduced several months before *Tymcio* was decided and was not pertinently amended thereafter, *Tymcio* was evidently not considered by the legislature.¹⁴⁶ The best supporting language available for this third approach is simply the general "representation . . . for indigent and other persons" language used in describing the purpose of the Ohio Public Defender Commission.¹⁴⁷

Despite the lack of supporting language and the presence of language supporting other interpretations, it is this third approach that the Ohio Public Defender Commission has adopted in its administrative rules. The rules state that a person is eligible for representation if he is "financially or otherwise unable to obtain an adequate legal representation without substantial hardship to himself or his family."¹⁴⁸ The rules go on to require a consideration of whether competent, retained counsel would be available and willing to represent the person being considered for publicly provided representation.¹⁴⁹ These administrative determinations evidence an enlightened and sound public policy approach to the problem of eligibility for representation, even though the statutory support for these determinations is meager at best. The legislature should expressly adopt the

144. These recoupment provisions in the statute are constitutionally permissible. *Fuller v. Oregon*, 417 U.S. 40 (1974). As to the validity of recoupment provisions generally, see *Annot.*, 32 L. Ed. 2d 936 (1973).

145. *State v. Tymcio*, 42 Ohio St. 2d 39, 325 N.E.2d 556 (1975), *appeal dismissed*, 423 U.S. 993 (1975). See text accompanying notes 50-53 *supra*.

146. The Ohio Public Defender Act was introduced on January 24, 1975 as H.B. No. 164 of the 111th General Assembly. 111TH OHIO GENERAL ASSEMBLY H.J. 172 (1975). *Tymcio* was decided April 2, 1975.

147. OHIO REV. CODE ANN. § 120.01 (Page 1978).

148. OHIO ADM. CODE § 120-1-03 (Banks-Baldwin 1978) (emphasis added).

149. *Id.* § 120-1-03(F).

Ohio Public Defender Commission's position by amending the statute.¹⁵⁰

B. *Determination of Indigency*

For persons seeking representation on the basis of indigency, the Ohio Act, as expanded by the administrative rules of the Ohio Public Defender Commission, calls for a method of determining indigency that is efficient and that allows consideration of all relevant financial information.¹⁵¹ The procedure for determining indigency is efficient because, except in assigned counsel counties,¹⁵² judges are not ordinarily burdened by determinations of indigency, which are instead left to the public defender requested to provide the services.¹⁵³ The Act also grants authority to the public defender to investigate the financial status of the individual seeking legal services, including the power to demand full financial disclosure by the individual and to obtain, without charge, relevant public records of any state or local agency.¹⁵⁴ This type of expansive authority allows the public defender to obtain sufficient information to make an informed decision on whether the person requesting services is in fact indigent.

The Act authorizes the Ohio Public Defender Commission to establish standards defining indigency.¹⁵⁵ It goes on to suggest that a liberal definition is appropriate: "[T]he commission shall consider an indigent person to be an individual who at the time his need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation. Release on bail shall not prevent a person from being determined to be indigent."¹⁵⁶ The Ohio Public Defender Commission responded with a thoughtful standard of indigency, not requiring the absolute inability of an individual to afford counsel, but rather an inability to do so "without substantial hardship to himself or his family."¹⁵⁷ Moreover, the inability re-

150. To the extent that any nonindigent person is found—under whatever interpretation of the Act—to be eligible for legal representation, the language of § 120.05(D) and (E) could be read as authority for requiring the person to pay for the legal services rendered. The Ohio Public Defender Commission requires this payment under its administrative rules. *Id.* § 120-1-03 (1)(1).

151. For a discussion of the wide variety of procedures used for determining indigency in a number of cities in the United States, see Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 168-70 (1974). See also Annot., 36 A.L.R.3d 1403, 1417-20 (1971).

152. OHIO REV. CODE ANN. § 120.33(B) (Page 1978).

153. *Id.* §§ 120.05(A), .15(D), .25(D). The public defender's determination is subject to court review. *Id.*

154. *Id.* §§ 120.05(B), .15(D), .25(D).

155. *Id.* § 120.03(B)(1). For a review of court cases dealing with definitions of indigency under public defender statutes of the various states, see Annot., 36 A.L.R.3d 1403, 1413-17 (1971).

156. OHIO REV. CODE ANN. § 120.03(B)(1) (Page 1978).

157. OHIO ADM. CODE § 120-1-03 (Banks-Baldwin 1978). Compare the very similar test

ferred to in the Commission's standards is an inability to obtain *adequate* legal representation and *competent* private counsel,¹⁵⁸ thus avoiding a tortured determination that a person is not entitled to publicly provided services because, for example, he could afford to hire "a forty cent lawyer."¹⁵⁹ The standards allow consideration of a variety of financial information, including the person's income, expenses, assets, and liabilities.¹⁶⁰ Because his ability to borrow is also to be considered,¹⁶¹ a person with little present income or wealth but with significant future earning potential could properly be required to procure a loan on the basis of this potential and to retain private counsel. The standards provide that no person shall be denied counsel "solely because his friends or relatives, other than spouse, have resources adequate to retain counsel unless such friends or relatives volunteer to obtain counsel promptly."¹⁶² This approach, taking account of the financial resources of the person and his spouse, but generally not of others, is a compromise that has been adopted in a number of states.¹⁶³ The standards emphasize that indigency requirements shall not be so stringently construed that they might influence a person to waive representation rather than incur the expense that might ensue.¹⁶⁴ The standards also indicate that a person able to pay for a portion of the cost of legal services may still obtain publicly provided representation, but will have to pay for the portion that he can afford.¹⁶⁵

V. CONCLUSION

The representation provisions of the Ohio Public Defender Act evidence a unique blend of the very best and the very worst in legislative efforts. On the positive side, the Act creates a basic structure of state and local-level representation and control that is a sensitive approach to the proper role for each governmental level. In addition, the Act generally comports with constitutional requirements for publicly provided representation and in some instances goes beyond con-

suggested by Duke, *supra* note 8, at 628, and the test proposed by Justice Goldberg. See text accompanying notes 46-47 *supra*.

158. OHIO ADM. CODE §§ 120-1-03, 120-1-03(F) (Banks-Baldwin 1978).

159. For a pitiful instance in which a defendant was denied counsel and found guilty after such a comment by the judge, see S. BING & S. ROSENFELD, *THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON* 51 (1970).

160. OHIO ADM. CODE § 120-1-03(A) (Banks-Baldwin 1978).

161. *Id.*

162. *Id.* § 120-1-03(B).

163. Some states do not consider the spouse's resources. Annot., 51 A.L.R.3d 1108, 1114-16 (1973).

164. OHIO ADM. CODE § 120-1-03(G)(1) (Banks-Baldwin 1978).

165. *Id.* § 120-1-03(I).

stitutional mandates to supply counsel when significant interests are at stake. Furthermore, as a result of statutory and administrative guidelines, determinations of indigency are based on realistic appraisals of ability to retain adequate private counsel.

The Act's deficiencies, however, outweigh its favorable attributes. It leaves gaps in a public representation system that should provide all counsel required by the Constitution. Its internal inconsistencies and ambiguities make it impossible for attorneys, let alone potential clients, to know the scope of representation responsibilities at any particular level in the system. Finally, the Act's contradictory provisions on whether indigency is required as a prerequisite to representation are inexcusable.

These problems deserve the immediate attention of the Ohio Legislature. The legislature should extend representation to all cases in which it is constitutionally required, without pulling back from legislative extensions beyond those requirements. Incomprehensible provisions should be made comprehensible. The Ohio Public Defender Commission's approach to the requirement of indigency should be expressly endorsed by statute. Until these problems are resolved, the Ohio Public Defender Act will remain but a partial and halting response to the need for an efficient and practical system for providing necessary legal services.

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